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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 101

MARK A. FREEMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 890-898) is reported at 167 F. 2d 786.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1948 (R. 899), and a petition for

rehearing was denied May 17, 1948 (R. 920). The petition for a writ of certiorari was filed June 16, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify the verdict.

2. Whether a mail fraud indictment against two or more defendants necessarily involves a charge of conspiracy, and whether petitioner was therefore subjected to double jeopardy by the trial court's refusal to require the Government to elect to proceed either on the substantive mail fraud counts or on the conspiracy count.

3. Whether the indictment failed to state the elements of the alleged offenses with sufficient precision and certainty.

4. Whether the trial court erred in excluding certain evidence offered to show that petitioner intended to perform the bottling contracts.

5. Whether the trial court erred in admitting the corporation's account books in evidence as records made in the regular course of business.

6. Whether the trial court erred in permitting a post office inspector to testify as to the details of a conversation between himself and petitioner.

7. Whether the conduct of the trial judge was unreasonable, arbitrary and hostile, thus depriving petitioner of a fair trial.

8. Whether the closing argument of the prosecuting attorney contained improper and prejudicial statements.

9. Whether the trial court's instructions to the jury were misleading and prejudicial.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed, any such letter, postal card, package, writing; circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695), provides:

> * * * in any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. * * *

STATEMENT

On February 26, 1943, a twenty-nine count indictment was filed in the District Court for the Northern District of Illinois against petitioner, Herman Garfield, Josephine Drose, and ten others. The first twenty-eight counts charged use of the

mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code; the twenty-ninth count charged a conspiracy to commit such violations. (R. 2-65.) The defendant Garfield died before trial[1] (R. 73). At the close of the Government's evidence certain counts were dismissed, leaving in the case counts 2, 3, 4, 7, 10, 11, 16, 19, 20, 22, 23 and 29 (R. 444, 451). The defendant Miss Drose was acquitted. The jury failed to agree as to the other defendants, exclusive of petitioner. Petitioner was found guilty on all counts remaining in the indictment, and on April 3, 1946, he was sentenced to imprisonment for five years on each of the mail fraud counts and for two years on the conspiracy count, all the terms to run concurrently. (R. 843, 847-850.) The judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit (R. 899).

The evidence in support of the verdict against petitioner may be summarized as follows:

Consolidated Associates, Inc., was incorporated on December 31, 1938, with a capitalization of $25,000 (R. 74). Petitioner and Garfield seem to have been the sole contributors to capital. Petitioner contributed roughly $3,000 in cash and was credited with a contribution of $4,700 in the form of furniture and fixtures; $15,000 more was obtained

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[1] The files of the Department reveal that two of the other defendants, Epstein and Sidney Davis, pleaded guilty and had been sentenced prior to trial.

through a bank loan secured by certain stock held by petitioner and Garfield. (R. 355, 667-669, 737.) Petitioner was president of the corporation and in complete charge of its internal operations (R. 92, 645).[2] The corporation held a wholesale liquor dealer's basic permit issued by the Bureau of Internal Revenue (R. 426, 532).

In May 1939, Consolidated's salesmen began to contact holders of whiskey warehouse receipts[3] (R. 395, 494-495). At the time the value of these receipts had depreciated and the holders stood to take a considerable loss on their original investment (R. 110, 176-177, 227, 235, 239, 459). The holders were asked to turn their receipts over to Consolidated for bottling and sale of the whiskey at maturity;[4] the holders were told by the salesmen that Consolidated's only interest in the matter was its fee of $1.50 per case for handling, and they were orally

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[2] Garfield was vice-president (R. 429). Miss Drose was the bookkeeper (R. 75). The other defendants were salesmen (R. 659-665).

[3] Since whiskey must age in the barrel for four years under Government supervision before it can be "bottled in bond," the smaller distilleries find it necessary to sell the warehouse receipts on the "green" whiskey to the public in order to finance themselves (R. 476-481). Of course, these receipt holders must ultimately dispose of their holdings at maturity of the whiskey to a licensed bottling concern.

[4] Some of the receipt holders seem to have been told that Consolidated would do the bottling itself (R. 88, 158, 270). Actually, Consolidated never had, and never applied for, a license which would permit it to engage in bottling operations (R. 426, 671).

guaranteed a price in excess of their original investment (R. 85-90, 115-118, 166, 169-170, 247, 269-270). In return for their receipts the holders were given a "conditional trade acceptance" (Pet. 95) in the amount orally guaranteed by the salesman, subject, however, to a contract (Pet. 96), under which title to the receipts passed to Consolidated, which left the time of bottling and sale of the whiskey entirely to the discretion of Consolidated, which permitted Consolidated to pledge the receipts for bottling charges, and which provided that the price stated in the "conditional trade acceptance" should be subject to revision "after the bottled goods are sold to reflect the actual purchase price as fixed herein." These forms were drawn up at petitioner's direction and they were sent out by him to the salesmen from the Chicago office (R. 118, 495, 652.) Despite provisions of this contract the receipt holders were assured orally that the amount they would receive would not fall below the price stated in the "conditional trade acceptance" (R. 115, 117, 166, 169, 181). Petitioner knew that the salesmen were making these promises (R. 92, 119, 181, 183).

Within the space of two months Consolidated had difficulty with the Securities and Exchange Commission over the "conditional trade acceptances" and that method of operation was abandoned (R. 507, 675). The customers were then approached with a new proposition. They were told

that their whiskies were of poor quality and difficult to bottle profitably (R. 92, 242, 505-507); that Consolidated had acquired a large amount of Bernheim, an excellent whiskey of an earlier maturity, and that they would realize greater profits at an earlier date if they would trade their receipts to Consolidated for Bernheim receipts at the prevailing market and then permit Consolidated to bottle and sell the Bernheim for them under the "I. W. Harper" label (R. 92-99, 119-122, 159, 161, 169-170, 242). The "conditional trade acceptance" and contracts were cancelled, and the customers were asked to execute a "power of attorney" (Pet. 97) which resembled the original contract in that it gave Consolidated power to pledge the warehouse receipts and discretion as to the date of bottling and sale, but differed in that it constituted Consolidated the customers' agent to effect the bottling instead of transferring title, and also in that it contained no statement of a definite amount to be realized. Petitioner had the "power of attorney" prepared (R. 517-518). About this time a great many new customers were persuaded to exchange their receipts for Bernheim receipts and to execute the "power of attorney," and some of these were prevailed upon to buy additional barrels of Bernheim (R. 189, 208-209, 223-224, 252-253). The salesmen continued to guarantee orally the amount the customers would receive (R. 93-94, 124, 224, 252-253), and continued to state that Consoli-

dated's only interest was in its commission (R. 123). The fall of 1940 was given as the bottling date (R. 92-93). Petitioner made promises of this nature himself (R. 208-209), and he knew that they were being made by the salesmen (R. 243, see Gov. Ex. 193).[5]

In reality Consolidated never had authority to use the "I. W. Harper" label (R. 262). Although the customers were never informed of the fact, and although petitioner denied it when questioned by a post office investigator, the Bernheim whiskey which was traded to the customers was held by third parties at the time of the trades as security for loans to Consolidated (R. 320-328, 432). Consolidated made a considerable profit on the Bernheim it traded to the customers (R. 363-380), but the customers were not informed of this (R. 672, 738). Consolidated disposed of the whiskey it received in the trades without loss (R. 363-380) and in at least one instance at a profit (R. 376). Frequently the customer, who had understood in dealing with the salesman that he was making an even trade, was later informed by petitioner that he owed Consolidated a balance on the deal (R. 147, 221, 255, 258).

When the Bernheim had attained its four-year maturity and was available for bottling in bond in

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[5] The exhibits have not been brought up to this Court with the record, but we know the nature of a great many of them from the briefs filed in the circuit court of appeals.

the fall and winter of 1940-1941, the customers were approached with the proposal of a new "switch." They were told that because of the new federal tax the whiskey market was depressed and that it would not be profitable to bottle the Bernheim at that time. They were advised to switch from Bernheim to "green" whiskies which could soon be used in "blends," in view of the coming market for such products. Again there were promises of increased profits. Many, accordingly, switched to Loretto, Meadowlawn, or Kentucky Senate of recent distillation and executed new "powers of attorney" designating Consolidated bottling agent. (R. 103-104, 128-129, 162, 190, 215, 226, 234, 246, 254, 265, 272.) Consolidated again took a secret profit on the exchange; and the receipts covering the "green" whiskey had already been pledged to cover its loans (R. 366, 370, 372, 374, 380).

Despite its meager capitalization, Consolidated did a cash business of approximately $2,000,000 during the two and one-half years of its existence (R. 357). Very little bottling, however, was effected. The corporation's books show that, while it acquired about 31,000 barrels of whiskey from its customers (R. 311), it caused to be bottled only about 1,200 barrels (R. 314), and it paid to them on the bottling contracts only about $16,000 (R. 358). In a number of cases, after the customer had been switched from his original holding into a

"green" whiskey, the original whiskey would be bottled and sold for Consolidated's account (R. 689-695).

On September 4, 1941, petitioner caused Consolidated to file a petition for reorganization and its assets were thereafter turned over to a Trustee in Bankruptcy (R. 638-642). As of that day Consolidated owed its customers 13,811 barrels of whiskey under the bottling powers of attorney (R. 314). To fulfill these contracts it had 14,194 barrels, but all of these had been pledged to creditors to secure loans amounting to $340,207.72 (R. 315-318) which it would have been necessary to pay off before the liquor could have been released for bottling (R. 352-353).

During the course of the trial the Government proved the mailing of the various letters alleged to have been mailed in those substantive counts of which petitioner was ultimately convicted.

ARGUMENT

1. We think it will be obvious to the Court from a reading of the above Statement that there is no merit to petitioner's contention (Pet. 8, 13, 33-34, 67-72) that the Government failed to produce substantial proof of the material allegations of the indictment. One need only glance at the tricky and dishonest "power of attorney" under which the customer surrendered his warehouse receipt and received no definite promise in return, and under which Consolidated, though acting as agent,

took a secret profit and transferred to the customer other whiskey which it had already pledged as security for its own loans. The exhibits contain a mass of correspondence which shows that petitioner was repeatedly put on notice of the statements of his salesmen and that he consistently evaded explanation (see, e.g., Gov. Ex. 193, 194). It is, of course, unnecessary in a prosecution for using the mails in furtherance of a scheme to defraud that all the alleged false representations be proven. *Holmes* v. *United States,* 134 F. 2d 125, 133 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Baker* v. *United States,* 115 F. 2d 533, 542 (C. C. A. 8), certiorari denied, 312 U. S. 692; *United States* v. *Dilliard,* 101 F. 2d 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635.

2. Petitioner contends that he has been subjected to double punishment since he was convicted of both the substantive offenses and conspiracy. The argument is that where two or more are alleged to have used the mails in furtherance of a fraudulent scheme, proof of the substantive charge includes all the elements of the conspiracy (Pet. 6, 9-10, 26-27, 43-49). We think it unnecessary to answer this contention[6] since there is sufficient evidence to sup-

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[6] We do not agree, however, that *Freeman* v. *United States,* 146 F. 2d 978 (C. C. A. 6), upon which petitioner relies, is a correct statement of the law. See *Beckett* v. *Hudspeth,* 131 F. 2d 195, 196 (C. C. A. 10); *Wilkes* v. *United States,* 80 F. 2d 285, 288 (C. C. A. 9); *Freeman* v. *United States,* 244 Fed. 1, 19 (C. C. A. 7).

port petitioner's conviction under the substantive counts and the shorter term under the conspiracy count runs concurrently. *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

3. Petitioner contends that the indictment was defective in that it failed to set forth the details of the alleged fraudulent scheme with sufficient particularity as to time, place and circumstances (Pet. 8, 13, 35, 73-76). But "in such an indictment, 'while particulars of the scheme are matters of substance and must be described with certainty sufficient to show its existence and character and to fairly acquaint the accused with the particular fraudulent scheme charged against them, the scheme itself need not be pleaded with all the certainty as to time, place and circumstance requisite in charging the gist of the offense, the mailing of the letter or other article in execution or attempted execution of the same.' " *Hass* v. *United States,* 93 F. 2d 427, 429 (C. C. A. 8); see also *United States* v. *Crummer,* 151 F. 2d 958, 963 (C. C. A. 10), certiorari denied, 327 U. S. 785. Here the time and place of mailing the letters was particularly described. The other matters of which petitioner complains fall rather within the scope of a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66.

4. Petitioner contends that the trial court erred in excluding certain evidence offered on the issue of his intent to perform the bottling contracts (Pet.

6, 9, 24-25, 36-43). The court permitted petitioner to introduce a great quantity of evidence to show that Consolidated had made extensive preparations for bottling (R. 507-510, 519-540) and that it had initiated a bottling and sales program (R. 540-566; see also R. 739-740, 742-743, 755-756, 762-763, 769). For its relevance to this issue of intent the court also permitted petitioner to introduce a considerable amount of evidence designed to show that a large competitor (Schenley) had taken active steps to defeat the bottling program in the fall of 1940 (R. 566-573, 587-589, 644-645, 745), that Consolidated's largest creditor (Klein) blocked the bottling program in September 1941 by refusing to turn over the warehouse receipts he held as security except after endorsing them "without recourse" (R. 602-615), and that as a result petitioner voluntarily took Consolidated into bankruptcy (R. 640, 779-780). All this evidence was obviously cumulative on the issue of intent; moreover, petitioner's difficulties with third parties presented collateral matters likely to confuse the jury, and the court quite properly stopped petitioner's attorney from going into details (see, e.g., R. 164-165, 186-187, 590, 638-643). Despite the court's repeated warnings, petitioner's attorney recurred to these excluded matters in his closing argument, and, when stopped by the court, he remarked to the jury, "Well, you see the search after the truth still fails, ladies and gentlemen." As a result of this,

the court again carefully instructed the jury that they should give no consideration to these collateral issues, that "a limited amount of evidence was admitted concerning" them to show petitioner's intent, and that they should disregard everything except "the evidence as you heard it from the witness stand."[7] (R. 813-816.) We think the trial court clearly acted with discretion in excluding evidence which was both collateral and cumulative. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 230; *Grell* v. *United States*, 112 F. 2d 861, 875 (C. C. A. 8). This is particularly true here, where petitioner's intent to bottle was not necessarily crucial, since he could have been convicted on the evidence of the secret profits alone.

5. Petitioner contends (R. 6, 10, 27-28, 49-53) that Consolidated's account books were received in evidence without the foundation for their authenticity required by the statute (28 U. S. C. 695, *supra*, p. 4). Identification was made by an employee who testified that she had worked on some of the books, that she was familiar with all of them, that they were kept in the regular course of

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[7] Petitioner argues that by this instruction the court intended to exclude from the jury's consideration all evidence previously admitted on these collateral matters. We think it clear, however, from the quoted language that the court merely meant to tell the jury that, while they could consider the fact of interference with the bottling program, they were to exclude from consideration all details of Consolidated's collateral difficulties.

Consolidated's business, and that the entries were made at or about the time of the transaction recorded (R. 281-285). The Government's accountant witnesses were cross-examined at length as to their summaries of the books (R. 335-353, 381-425) and petitioner himself specifically referred to them at at least one point (R. 555). We submit that on the record there can be no doubt that these were Consolidated's books. Nor does petitioner contend that they were not. His objections go rather to the weight to be accorded to the evidence extracted from them.

6. Petitioner contends that the trial court erred in permitting the postal inspector who investigated Consolidated to testify as to opinions he formed, on the ground that such evidence was irrelevant and hearsay (Pet. 7, 10-11, 28, 53-55). The inspector testified to statements made to him by petitioner relative to complaints filed with the Post Office Department by several of Consolidated's customers (R. 427-437). Such evidence was clearly relevant, and it was properly admitted in evidence as petitioner's own admission. 4 Wigmore, *Evidence* (3rd ed. 1940), § 1048. The only expression of opinion by the inspector was excluded by the court (R. 434-435). The other alleged expression of opinion was in reality a question addressed to petitioner by the inspector (R. 430-431). We submit that the contention is without merit.

7. It is said that the trial judge displayed such obvious bias and hostility as to deprive petitioner of a fair trial (Pet. 7, 11, 29-30, 55-59). But we submit that the group of incidents under this section of the petition, culled from the record of a five-weeks trial, do not, when read in context, reveal any unfairness. It is true that the judge on occasion spoke sharply to defense counsel. But rightly so, for he was sorely tried by their conduct. Despite an agreement designed to prevent unnecessary objections (R. 81, 780), defense counsel repeatedly interposed objections where it was obvious that they had already properly saved the point in the record (see, e.g., R. 88-89, 91-92, 146, 238, 242, 364-371). And, despite the court's repeated and clear rulings, defense counsel never ceased in their efforts to get before the jury the details of the collateral Klein and Schenley affairs and the bankruptcy proceedings (see, e.g., R. 151, 164-165, 198-204, 258, 530, 745-750, 760, 766), culminating eventually in the contemptuous remark to the jury mentioned above (*supra*, p. 14). Most of the incidents complained of here would have been perfectly proper under any circumstances; the court's occasional severity defense counsel brought upon themselves.

8. Petitioner contends that he was deprived of a fair trial by reason of statements in the prosecutor's closing argument to the effect that he had duped the investors, and that he was a liar, a thief,

a confidence man and an old hand at the game (Pet. 7, 11-12, 30-31, 59-64). These statements, with the exception of one, were within the evidence and therefore not improper. *United States* v. *Socony-Vacuum Oil Co., supra,* at 238-239; *Stephan* v. *United States,* 133 F. 2d 87, 98 (C. C. A. 6), certiorari denied, 318 U. S. 781; *United States* v. *Holt,* 108 F. 2d 365, 369 (C. C. A. 7), certiorari denied, 309 U. S. 672; *United States* v. *Wexler,* 79 F. 2d 526, 530 (C. C. A. 2), certiorari denied, 297 U. S. 703. Although there was no evidence to support the prosecutor's remark that the defendants were old hands at the game, no prejudice resulted since prompt apology was made and the jury were instructed three times to ignore the matter (R. 793, 794, 813). *United States* v. *Socony-Vacuum Oil Co., supra,* at 242, 243.

9. In our opinion the trial court's final instructions (R. 795-816, 840-842) were fair and adequate when read as a whole in the light of the evidence, and we think petitioner's complaints on this score are without merit (Pet. 7-8, 12, 31-32, 64-67). As we have already pointed out, we think petitioner misinterprets the charge in stating that it excluded all the evidence previously admitted relative to the bankruptcy proceeding and the Schenley and Klein matters (see fn. 7, *supra,* p. 15).

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decision is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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